



STATE OF SOUTH DAKOTA  
DENNIS DAUGAARD, GOVERNOR

October 4, 2012

U.S. Army Corps of Engineers, Omaha District  
CENWO-PM-A  
Attn: Missouri River M & I Water Storage Reallocation Study  
1616 Capitol Avenue  
Omaha, NE 68102-4901

Dear Sirs,

Thank you for the opportunity to provide comments as part of the scoping process about the proposed reallocation studies for the Missouri River mainstem reservoirs. As was stated on August 27, 2012, in Pierre at both the public hearing and at the meeting between the Corps and state officials, the state of South Dakota is disturbed with the direction the Corps is taking regarding their attempt to market water from the Missouri River Reservoirs. I find it especially disturbing the Corps is choosing to operate in such an expedited time frame during this process. The Corps has waited more than 50 years since the 1958 Water Supply Act and expects comments in 30 days.

The state offers the following comments as part of the scoping process for the proposed reallocation studies for each of the mainstem reservoirs and the Corps' water marketing plan in general. Please consider these comments and include them in the administrative record.

The Corps has authority to dedicate pools in the reservoirs to store water for congressionally authorized purposes. The Corps Master Manual refers to these authorized purposes as "flood control, navigation, hydropower, water supply, water quality, irrigation, recreation, and fish and wildlife." 2006 Master Manual 4-02. At present, the storage for authorized purposes is allocated to a multiple use pool, excluding the permanent pool (meant for silt storage) and the exclusive flood control pool. Municipal and industrial uses are in the multiple use pool. There is no need to create separate pools for each type of use; the volume of water in the reservoirs simply does not dictate doing so.

The pending Corps proposal is couched as a plan to "reallocate" not only storage, but also the use of water and exceeds the Corps' legal authority. The Notice of Intent for the pending allocation study states "the 1944 Flood Control Act, as amended, directed the USACE to allocate the river's resources among the authorized Missouri River project purposes." The 1944 Flood Control Act made no such direction. The states have authority to allocate the water resources, not the federal government, and the 1944 Flood Control Act, Section 1, recognizes the



applicability of state water laws. Similarly, the 1958 Surplus Water Act, Sections 301(a) and 301(c) recognize the applicability of state granted water rights.

The Corps lacks authority to adjudicate water rights or allocate use of the waters of the state among appropriators within the state, a function reserved to the state of South Dakota and its courts. When the federal government is involved, the McCarren Act applies. 43 U.S.C. § 666.

The Corps also lacks authority to allocate use of water among the states and tribes, a function that it purports to exercise in whole or in part through its attempt to reallocate water in the mainstem system. These allocations are undertaken through compacts among states and tribes and/or original proceedings in the United States Supreme Court.

Under this proposal, the Corps would control management of the water used for current and future municipal and industrial use. Basin states have long enjoyed the right to issue water permits for the use of Missouri River water. The ability for states to manage their own water supplies for the benefit of their citizens is a state's right that has long been recognized by the federal government. This study must recognize the state's role in granting water rights.

The Corps' proposed action also exceeds its legal authority in claiming all water in the mainstem reservoirs is project water or stored water while ignoring the natural flow component of the Missouri River. Natural flows are those flows that exist in the river absent the reservoirs. The Corps' claim not only ignores the history of water flows in the Missouri River before the Missouri River Basin Project, but fails to recognize that natural flows have not ceased. The Corps' effort to federalize natural flows ignores the balance of state and federal interests articulated in the 1944 Flood Control Act and other federal legislation, as well as longstanding state ownership of water stemming from the equal footing doctrine.

A distinction must be recognized between the nature of nonproject water, such as natural-flow water, and project water, and between the manner in which rights to use such waters are obtained. Right to use of natural-flow water is obtained in accordance with state law. *Israel v. Morton* 549 F.2d 128, 132 (9<sup>th</sup> Cir. 1977). It is not federal project water. *Id.* On the other hand, federal project water is dependent on federal law to a certain degree, since it would not be available for use "but for the fact that it has been developed by the United States." *Id.*, *Kittitas Reclamation District v. Sunnyside Valley Irrigation District* 626 F.2d 95, 99 (1980). Even the federal regulation of federal project water is not absolute; the state still has authority to regulate withdrawals of water from storage in federal projects. *Id.*, *California v. U.S.* 438 U.S. 645 (1978).

The allocation of costs for building the reservoirs is done. The 1944 Flood Control Act authorized an initial allocation of repayments for building the reservoirs. The 1944 Flood Control Act § 9(c) authorized allocation of costs to "the reclamation and power developments"



undertaken by the Interior Secretary under the Act (to the “transmission lines and related facilities” that § 5 authorizes the Interior Secretary “to construct or acquire” for transmitting and disposing of electric power). *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 108 S.Ct. 805, 98 L.Ed.2d 898(1988). It also authorized allocation of costs to the “irrigation works” that § 8 authorizes the Interior Secretary “to construct, operate, and maintain” under the reclamation laws. *Id.* As seen Section 9 (c) refers only to allocations of costs and repayments by energy users and irrigators and does not include any mention of repayment by other authorized users. *Id.* There is no congressional authority to charge other users for costs of construction.

A reallocation of costs cannot occur absent congressional authorization. In 1977 when the power functions of the mainstem reservoirs were transferred from the Bureau of Reclamation to the Department of Energy, Congress was concerned the change would prompt an administrative reallocation of costs for multiple purpose reservoirs. South Dakota Senator McGovern proposed the following amendment which ultimately became part of the Department of Energy Reorganization Act:

Neither the transfer of functions effected by paragraph (1)(E) of this subsection nor any changes in cost allocation or project evaluation standards shall be deemed to authorize the reallocation of joint costs of multipurpose facilities theretofore allocated unless and to the extent that such change is hereafter approved by Congress.”

42 U.S.C. § 7152(3). Senator McGovern explained that “Congress had carefully evaluated the financial aspects of the total project in previous years,” including approval of financial reports and recommendations and that it was therefore “proper to protect the allocation of joint costs on all projects when they have been made in Congress” including, specifically, those pertaining to the Missouri Basin project. 123 Cong. Rec. S15300 (daily ed. May 18, 1977).

The Notice of Intent cites to the 1958 Water Supply Act as authority to conduct the allocation study and to charge fees for storage. The 1977 McGovern amendment precludes the Corps from administratively reallocating the joint costs of multiple use facilities, since the allocations were already “made in Congress.”

The Notice of Intent also indicates the Corps intends to “make a change in the use of storage” so as to invoke the surplus fee requirements of the 1958 Water Supply Act. Such reallocation cannot, of course, require the imposition of fees unless the project is an actual constructed modification of the dams and the parties agree to such fees in advance, neither of which applies here. The maximum repayment period also bars imposition of costs by the Corps for original construction. 43 U.S.C. 390b.

If Congress authorizes the Corps to perform a reallocation study for the Missouri River mainstem system, we request the United States Bureau of Reclamation be granted cooperating agency status and participation in producing the study. Reclamation has experience and an understanding of western water law and how water is managed in large reservoir systems in the

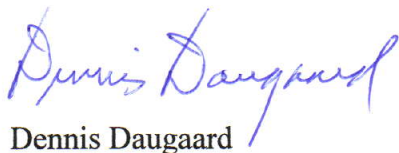
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Western states. They are the agency with experience in calculating fees for operations and maintenance, having done so for many Reclamation projects throughout the west. They routinely distinguish between natural flows and stored water available for contract.

South Dakota permanently lost more than 500,000 acres of its most fertile river bottom lands when the reservoirs were filled. While we received benefits, we also paid a very high price in return for federally promised irrigation which never occurred. This pursuit of Missouri River water allocation, ignoring congressional recognition of states' rights to develop water supplies and to manage natural flows, is offensive.

Thank you again for the opportunity to provide comments in regard to the Missouri River mainstem reservoir reallocation study. The state of South Dakota asks the Corps continue to provide information to the state about the status of this matter if it moves forward. I also ask the Corps to provide the state with a draft scope of work and that the state be afforded an opportunity to provide input.

Sincerely,



Dennis Daugaard

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cc: Senator Tim Johnson  
Senator John Thune  
Representative Kristi Noem